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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 694

NORTHEAST AIRLINES, INC.,

Petitioner,

—against—

MARILYN W. PEARSON, as Administratrix of the Goods, Chattels and Credits of John S. Pearson, Deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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The issues in this case have not been passed upon in any previous decisions of this Court.

Respondent's brief (p. 2) accuses petitioner of failing to cite or discuss certain past decisions of this Court which she claims "established the general principles applicable to this case". The short answer to this accusation is that petitioner did not cite the cases referred to because they are clearly distinguishable from the case at bar and based on different legal principles. Nevertheless, since respondent

claims that these cases are dispositive of petitioner's right to be heard by this Court, let us examine them.

Respondent cites *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U.S. 532 (1935); *Bradford Electric Light Co.* v. *Clapper*, 286 U.S. 145 (1932); *Pacific Employers Insurance Co.* v. *Industrial Accident Commission*, 306 U.S. 493 (1939); *Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66 (1954); *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514 (1953) and *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156 (1946), as standing for the proposition that a "forum state may constitutionally apply its own law to the decision of a case involving the laws of other states, if it has sufficiently substantial contact with the activity in question."

The first three cases above-named involved the question of whether a forum state could give relief under its own Workmen's Compensation statute when the contracts for work were made therein but the injury occurred elsewhere. In those cases it was held that the forum could award compensation under its own applicable statute. In the Workmen's Compensation cases, as this Court has pointed out, the liability was "not for a tort" (*Alaska Packers Association* v. *Industrial Accident Commission*, *supra*, at 541). Moreover, the statute of the forum state was applicable by its own terms. Here, the New York Court of Appeals has itself held that the only liability is in tort, and that the New York statute has no application. *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y. 2d 34, 172 N.E. 2d 526 (1961). Clearly, the Workmen's Compensation cases are neither controlling nor persuasive.

Watson v. *Employers Liability Assurance Corp.*, 348 U.S. 66 (1943), claimed to have been ignored by petitioner, involved a suit under a Louisiana direct action statute against a Massachusetts insurer which had prospectively attempted to prohibit such suit by a clause in the insurance contract to that effect. The contract was signed in Massachusetts and delivered in Illinois. Many decisions of this Court have held insurance to be peculiarly within the legislative power of the domicile of the insured. The Watson decision turned upon the Court's determination that the contract issues were not paramount and that the application of this insurance principle also required a consideration of other factors. The *entire* Louisiana statute was applied in that case and the sufficiency of Louisiana contacts, to wit, the locus of the tort, coupled with plaintiff's domicile, was found by this Court to support such application of the *whole* Louisiana statute. There was no legal surgery performed upon a statute since it was a Massachusetts contract rather than a Massachusetts statute which formed the basis of conflict in *Watson*.

Respondent suggests that *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514 (1953), settled the issue in this case. Nothing could be more erroneous. This is demonstrated by reference to the first sentence of the paragraph which immediately precedes the quotation from the *Wells* decision quoted by respondent at pages 4 and 5 of her brief, to-wit: "The rule that the limitations of the forum apply (which this Court has said meets the requirements of full faith and credit) is the usual conflicts rule of the states." 345 U.S. at 517. The "limitations" referred to by the court were only time limitations as is made clear

in the paragraph immediately preceding the quotation. (345 U.S. at 516-517). Therefore, it is most clear that the basis of the *Wells* decision was the peculiar categorization of time limitations in the body of conflict of laws doctrine as accepted in previous decisions of this Court. There are no decisions of this Court which concede a similar status to damage limitations, nor is there any established conflict of laws rule to that effect.

In *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), cited by respondent at page 9 of her brief, this Court pointed out that a state could adopt its own conflict of laws rules, and that a federal court sitting in the state would be bound by those rules; but it was careful to point out that the state could act only "* * * within the limits permitted by the Constitution." 313 U.S. at 496. The *Klaxon* case did not involve damage limitations and the issue here is precisely whether the "*Kilberg* rule" is within the permissible limits.

Respondent further cites *Vanston Bondholders Protective Committee* v. *Green* 329 U.S. 156 (1946). In that case this Court discussed the applicability of state conflict of laws rules to determine the existence of allowable claims under the Federal Bankruptcy Act. Reference to the language of the opinion is enough to distinguish that decision from the present situation. After considering the various contacts involved, this Court said:

> "* * * But we need not decide which, if either, of these two states' laws govern the creation and subsistence and validity of the obligation for interest on interest here involved. * * *

> In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. * * * [B]ankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress * * *.
>
> When and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by federal law. * * * " 329 U.S. at 162, 163.

Therefore, the Supremacy Clause of the United States Constitution[1] rather than the Full Faith and Credit Clause was determinative.

This same consideration formed the basis for this Court's decision in *Massachusetts Bonding & Insurance Co.* v. *United States*, 352 U.S. 128 (1956), similarly claimed by respondent to have been ignored by petitioner. The basis of the *Massachusetts Bonding* decision was the provision of the Federal Tort Claims Act that punitive damages may not be awarded against the government, and that the government should be liable for compensatory damages where a private individual would be liable for punitive damages. Thus the Supremacy Clause, and not the Full Faith and Credit Clause, was involved, and the case is no authority for the right of a state to ignore the damage limitations of the statute of a sister state where no federal statute is involved.

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[1] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Const., Art. VI, cl. 2.

The foregoing examination of the authorities cited by respondent makes it abundantly clear that they do not determine the issues here presented. Moreover, in none of the cases cited by respondent has this Court passed upon the effect to be given the 1948 amendment to 28 U.S.C. § 1738,[2] the implementing statute to the Full Faith and Credit Clause of the Constitution (Art. IV, sec. 1), which for the first time made it clear that "Acts of the legislature of any State", *i.e.*, statutes, were included within the intent of the Full Faith and Credit Clause. This, of course, is consonant with the silence of the majority below with respect to such amendment, but does not shed light on nor assist in the determination of the constitutional question raised by the majority's total indifference to said amendment. Although the interpretation which is to be given to the 1948 amendment could have been stated by this Court in its opinion in *Hughes* v. *Fetter*, 341 U.S. 609 (1951), this Court found it unnecessary to consider the effect of the 1948 amendment in reaching that decision:

> "In certain previous cases, *e.g.*, *Pacific Ins. Co.* v. *Commission*, 306 U.S. 493, 502; *Alaska Packers Assn.* v. *Commission*, 294 U.S. 532, 547, this Court suggested that under the Full Faith and Credit Clause a forum state might make a

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[2] "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

* * * *

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the Courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738.

> distinction between statutes and judgments of sister states because of Congress' failure to prescribe the extra-state effect to be accorded public acts. Subsequent to these decisions the Judicial Code was revised so as to provide: '*Such Acts* [of the legislature of any state] . . . and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have . . . in the courts of such State . . . from which they are taken.' (Italics added.) 28 U.S.C. (1946 ed., Supp. III) § 1738. In deciding the present appeal, however, we have found it unnecessary to rely on any changes accomplished by the Judicial Code revision." 341 U.S. at 613, f.n. 16.

This was the last specific reference to the effect which might be given such amendment by this Court and indeed that precise question has not been presented to this Court in the interim. It is now presented by this petitioner.

This case involves far more than simply a question of New York law.

The respondent makes the extraordinary argument that this Court should not consider this case because only issues of New York law are involved. It is true, of course, that what we are considering is a New York rule—but the question is not whether the District Court correctly applied the New York rule, but whether the New York rule is consistent with the command of the United States Constitution. It is sheer sophistry to say that because only New York has adopted a "*Kilberg* rule", this Court should not

concern itself with this case. Suppose, for example, that only Mississip denied to its Negro citizens, the right to an educa on in its state institutions. Would, or could, this Court turn its back because only a question of local Mississippi law is concerned? The question answers itself.

The absurdity of respondent's argument is best illustrated by this quotation from her brief (pp. 10-11):

> "These decisions point up the purely local nature of the *Kilberg* and *Pearson* decisions. There is nothing to prevent other states from following the *Kilberg* principle * * * At this time however, the question is purely one of New York law. If other states follow the *Kilberg* principles, this will be purely a matter of state law in each case. * * *.

In other words, even if other states adopt the *Kilberg* rule and ignore parts of the statutes of sister states at their pleasure, still it is a question merely of local state law; and the fact that four judges of the federal Court of Appeals felt that the rule was unconstitutional and two judges of the New York Court of Appeals had at least grave doubts of its constitutionality should not impel this Court to consider the question. No state action, the respondent seems to argue, should ever be reviewed by this Court if the lower courts have found no violation of the Constitution.

It may be that this Court ordinarily accepts the lower courts' findings as to what the state law *is;* but it is inconceivable that this Court would abdi-

cate its responsibility to the extent of leaving the final determination of the constitutionality of that law to the inferior courts.

Nor is it true as the respondent implies that a decision in this case will affect only the courts in New York. Even if we consider only the narrow question of the effect to be given to the Massachusetts wrongful death statute, it is clear that a decision here will have a profound effect elsewhere.

In New Hampshire, for example, the courts seem to give a full measure of faith and credit to the Massachusetts wrongful death statute as required under the United States Constitution. *Ross* v. *Eaton*, 90 N.H. 271, 6 A. 2d 762 (1939). Vermont, on the other hand, has given only some measure of faith and credit when enforcing the same statute and then on the basis of comity, since it contends that "of course the full faith and credit clause of the Federal Constitution does not relate to the statutes of a sister jurisdiction * * *." *Wellman* v. *Mead*, 93 Vt. 322, 326, 107 Atl. 396, 398 (1919). Rhode Island refuses to give any faith and credit to said statute absent a decision by this Court on the significance of the Full Faith and Credit Clause of the Constitution. The highest court of Rhode Island stated in *McGrath* v. *Tobin*, 81 R.I. 415, 421, 103 A. 2d 795, 798 (1954):

> "From our examination of the cases and some of the legal literature on the full faith and credit clause, we have concluded that the supreme court has not finally decided how far it will go in holding legislative acts to be 'public acts' within the meaning of that clause. * * *"

The courts of those states have viewed the constraints under the Full Faith and Credit Clause in wholly different ways. A pronouncement by this Court will at least direct them in the ways in which they should go as far as the Massachusetts statute is concerned, and it cannot be doubted that a decision in this case by this Court will at least illuminate for the courts of all the states the path marked out by the Full Faith and Credit Clause—but heretofore obscured.

A decision in this case will not involve this Court in the minutiae of weighing contacts.

The respondent argues that this Court should not review this case because the court will inevitably become involved in "the minutiae of weighing contacts." This is not the fact.

If, as the petitioner urges, this Court should hold that the Full Faith and Credit Clause and its implementing statute require the New York courts to apply the Massachusetts statute in its entirety if it is applied at all, then this Court need have no concern whatever with "contacts".

If, on the other hand, this Court should hold otherwise, then it will only be necessary to decide whether the domicile of the decedent's next of kin is a sufficiently substantial "contact" to allow the New York courts to apply New York law or policy in whole or in part.

In the disssent from the original panel opinion (which became a part of the majority en banc decision), Judge Kaufman conceded that "It is not yet en-

tirely clear what contacts are sufficient to permit a state to apply its own substantive law to a wrongful death action where the physical impact causing death occurs in another jurisdiction." (Petition, p. A-32). He considered only two "contacts" or interests of New York. The first was New York's "interest in requiring Northeast Airlines to maintain safe facilities elsewhere." This "interest" Judge Kaufman specifically discarded, saying "* * * we need not speculate whether New York may constitutionally use its tort law to deter an airline from out of state negligence * * *." (Petition, p. A-35).[3]

The second, and in effect the only, interest which Judge Kaufman found sufficient was New York's "* * * well recognized interest in the nature and amount of recovery obtained by dependents of the decedent in a situation such as this, regardless of the place of injury, because the dependents are its own domiciliaries." (Petition, p. A-35).[4]

This Court has never held that domicile alone was a contact sufficient to justify application of the law of the state of domicile when it conflicts with the law of a state having other significant interests. The effect of upholding the validity of such a ruling will raise legion due process problems. Cf. *Home Insur-*

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[3] If this "interest" had weighed heavily in the decision, it seems apparent that it would raise a serious question at least as to whether New York is not imposing an undue burden on interstate commerce.

[4] Although Judge Kaufman refers to decedent's "dependents" and to the "wife and children who remain behind after the death of the breadwinner", the fact is that in the case at bar decedent's sole next of kin was his wife, Marilyn W. Pearson, and the testimony at the trial was that she was employed prior to and at the time of her husband's death and that she worked for the same employer following his death but at a higher salary. R. 72a-76a.

ance Co. v. Dick, 281 U.S. 397 (1929). In *Alaska Packers, supra,* and in *Watson, supra,* this Court found that domicile justified application of the law of the forum only when coupled with other substantial interests. However, in *John Hancock Ins. Co. v. Yates*, 299 U.S. 178 (1936), this Court found that when plaintiff removed her domicile from New York to Georgia following the event which gave rise to the cause of action, and was faced with the possibility of becoming a public charge in the latter state, the interest of plaintiff's new domicile was not sufficient to justify application of the law of that forum to strike down a defense valid under the law of New York. In these circumstances, Georgia's choice of local law was held to be violative of the Full Faith and Credit Clause. Thus it is apparent that the fact of domicile alone may be as fortuitous as those of negligence or impact, but at least the interests of those states wherein the negligence or impact occurs are fixed and contemporaneous with the event giving rise to the cause of action, whereas the interest of the state of domicile alone may be wholly transitory.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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